FILED
APR 21 1945
CHARLES ELMORE CROPLEY
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(2)

Supreme Court of the United States

OCTOBER TERM 1944

No. 1088

EMANUEL DEUTSCH, individually and doing business under the firm name and style of UNITY SANITARY SUPPLY CO.,

Petitioner,

against

HERMAN HOGE, ARTHUR HOGE, GUS HOGE, JOEL HOGE and OLIVER HOGE, individually and doing business under the firm name and style of HOGE BRUSH COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The respondents are concededly partners engaged in business under the firm name and style of Hoge Brush Co. and are non-residents of New York and have their office and factories in New Knoxville, Ohio, where they manufacture brushes (R. p. 13).

This action represents a second attempt to sue in New York. On October 25, 1941, plaintiff-petitioner sued the respondents in the New York Supreme Court under the name of Hoge Brush Co. individually and doing business as a subsidiary of the Hoge Lumber Co., a foreign corporation, by serving one Carl H. Werheim, said to be managing agent of the Hoge Brush Co. and an officer of

the Hoge Lumber Co. (p. 11). This service was subsequently quashed by the Appellate Division of the said Supreme Court, First Department, in an opinion found at pages 11, 12. The service there was sought to be sustained on the theory that the appellees had appeared generally because a Pennsylvania lawyer representing the defendants had sought an extension of time to answer and asked for and obtained a copy of the complaint (p. 12).

Having failed to sustain the jurisdiction of the Court by that method, they sought, in a new action in the New York Supreme Court, to obtain jurisdiction in the following way. They delivered copies of the summons and complaint to one William E. Epstein, 261 Broadway, New York, N. Y., on June 10, 1943, the process server claiming that William E. Epstein was in charge of the respondents' office in the State of New York (pp. 58-60), and on the same day they mailed the summons and complaint, by registered mail, to the respondents, addressed to them individually (pp. 61, 62).

The action was removed from the New York Supreme Court to the District Court of the United States for the Southern District of New York on July 20, 1943 (p. 10). After its removal, defendants appeared specially* on August 10, 1943, and gave notice of motion by petition and affidavit to dismiss on the ground that the Court had no jurisdiction over the persons of the defendants (pp. 4-8).

The petition in support of the motion to quash the service contained the following recitals under oath (pp. 13-18):

> "11. These defendants have never engaged in business in the State of New York, have never had an office for the transaction of business in the State of New York, have never kept any books of account in the State of New York, have never had any bank accounts in the State of New York, have never had any

* *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 43 S. Ct. 106.

employees in the State of New York, have never leased any property or offices in the State of New York, have never made any contracts in the State, and have never kept any merchandise in the State of New York.

12. These defendants are residents of the State of Ohio having their main office at New Knoxville, Ohio, where they manufacture brushes in the State of Ohio, where they fill all their orders for merchandise which they send to all parts of the United States, and are engaged in interstate commerce.

13. The relations between these defendants and Epstein arose as a result of certain correspondence, which is annexed hereto and marked Exhibit 'A', commencing with a letter addressed by the Imperial Mfg. & Trading Co., a corporation of which Mr. William E. Epstein is president, which apparently was incorporated in the year 1905, as appears by its letterhead.

14. To this letter Mr. Carl H. Werheim, our manager, replied by letter dated November 21, 1939, declining to permit Mr. Epstein's corporation to act as agent.

15. On February 19, 1940, the Imperial Mfg. & Trading Co. again addressed a request for a catalogue offering to market the defendants' commodities.

16. On February 21, 1940, Mr. Werheim replied offering to permit the Imperial Mfg. & Trading Co. to solicit business for us and agreeing to pay him 5% on all goods which were actually sold.

17. On February 23, 1940, the Imperial Mfg. & Trading Co. accepted the proposal and asked for samples, and on March 5, 1940, there was sent to him samples, giving him an outline of how business was to be done. At the same time there were transmitted a number of samples.

18. The Imperial Mfg. & Trading Co., or its president, Mr. William E. Epstein, was never authorized to make any contracts, agree to extend credit, perform any other act committing the Hoge Brush Company to any obligation without the consent and approval first

had. All Mr. Epstein was authorized to do was to solicit accounts and to transmit orders or proposals to us at our home office where they are accepted if satisfactory, and if unsatisfactory, they are rejected (see letter addressed to plaintiff dated June 13, 1941, copy of which is annexed hereto and marked Exhibit 'B').

19. It came to our attention for the first time when the plaintiff attempted to commence the first action, that the Imperial Mfg. & Trading Co., or Mr. William E. Epstein, had listed the Hoge Brush Company in the New York Telephone Directory and had listed that name on the bulletin board of the building at 261 Broadway. This was done without our knowledge and consent and without our approval, and was repudiated by us in the first action (see the affidavit of Mr. Werheim at folio 41 of the prior record and the affidavit of Mr. Stenzler at folio 58 of the same).

20. On June 11, 1943, before we received the summons and complaint in this action, as appears by the registered return receipt, we wrote the Imperial Mfg. & Trading Co. as follows:

'June 11, 1943

The Imperial Mfg. & Trading Co.
261 Broadway
New York, N. Y.

Dear Mr. Epstein:

Our attention has been drawn to the fact that you caused the name of this Company to be listed in the directory of your building with the same number as your office and also that you have caused our name to appear in the New York telephone directory with the same phone number as used by yourself. You, of course, did that merely for the purpose of gaining any advertising value that the name might contribute but this is an unauthorized use of our name and we would request that you discontinue the same immediately and in any other instances where you have caused our name to appear publicly that you likewise withdraw it.

If you wish to purchase any merchandise we will be pleased to quote you prices if we can make deliveries and we still feel we can supply many items

that you can profitably handle. We have never maintained any branch offices as all of our business is done in the home office only.

Yours truly,

HOGE BRUSH COMPANY
A. F. HOGE (Signed)
A. F. Hoge

AFH:NS'

21. Deponent respectfully submits that the business out of which this controversy arose was not transacted in the State of New York, as appears by the correspondence too voluminous to set forth herein in detail, the Imperial Mfg. & Trading Co. had quoted prices to the plaintiff in this action on some merchandise which the plaintiff was anxious to supply to the United States Navy.

22. Thereafter, apparently the plaintiff, without the defendants' knowledge or approval, entered a bid with the Navy based as he claims on the price quotations furnished to him. When his bid was accepted, he gave an order to the Imperial Mfg. & Trading Co., which we could not accept for the reason that in the meantime the cost of labor and material had risen and the goods could not be manufactured without a substantial loss to these defendants.

23. Thereafter, in an effort to help the plaintiff out of the dilemma, in which by his own improvident act he had placed himself, various negotiations and proposals were had which were never accepted by the plaintiff. If the plaintiff has sustained a loss as a result thereof, it was as the result of his own improvidence and through no fault of these defendants. If the order had been accepted by us, it would have constituted a contract made not in the State of New York *but in the State of Ohio.*

24. As we are advised by our counsel and verily believe, the place where the offer is accepted, or the last act indicating acceptance is performed, constitutes the place where the contract is made. It is therefore too clear for argument that the first, second and third causes of action could not have arisen anywhere but the State of Ohio.

25. In the second cause of action plaintiff maintains that it sold less merchandise, but here again, with respect to the same, as the correspondence clearly indicates, the proposals were made to us by correspondence in the State of New York, and that likewise this cause of action could not have arisen in the State of New York. Moreover, even if it can be said that technically some contract was made in the State of New York, this would be insufficient to compel these defendants to litigate with the plaintiff in the State of New York where it never actually engaged in business.

26. We are advised by counsel and verily believe that isolated transactions of business does not constitute doing business in the State of New York nor is soliciting orders therein constituting business, and unless it can be said that these defendants who are constructively present in the State of New York not casually, but with a fair measure of permanence and continuity. It cannot be said that we were doing business in the State of New York to the extent that these defendants must leave their home jurisdiction and travel six hundred and fifty miles to the plaintiff's domicile to litigate the questions involved in this controversy.

27. The defendants respectfully submit that if Section 229b of the Civil Practice Act can be construed to require us to litigate in the State of New York, then this Section would be violative of our rights under Article IV, Section 2 and the Fourteenth Amendment to the Constitution of the United States, for lack of due process of law and for abridging the privileges and immunities of a citizen of the United States, and accordingly if such a construction be adopted, we challenge the constitutionality of such Section for such reasons, and respectfully ask that the same be declared by this Court as unconstitutional and void.

28. Petitioners are advised and verily believe, however, that the report of the Law Revision Commission, upon whose recommendation the legislature of the State of New York adopted Section 229b of the Civil Practice Act, clearly shows that this statute was designed to reach only such persons who actually are engaged in business in the State of New York by main-

taining offices in that State and who are present therein to the extent as would suggest that they are not in the State casually but present with a fair permanence and continuity.

29. Petitioners further respectfully suggest that the service was improper on Mr. Epstein as he in any sense could not be regarded as an agent or a person in charge of any business in which the defendants are engaged, and that therefore the service was improper, and the courts of the State of New York have no jurisdiction whatever over the persons of these defendants."

The Hon. Henry W. Goddard, District Judge, after a hearing, made findings of fact which are contained in his opinion at pages 96-97, as follows:

"It appears from affidavits that Epstein was not an employee of the defendants, that he merely solicited orders for them on a commission basis; that he was not authorized to quote prices other than those submitted to him by defendants; that all orders which he obtained were subject to the approval of the defendants' Ohio manager; that the merchandise to fill the orders was shipped from Ohio where defendants' factory is located and were authorized to do business; that the bills for the merchandise which he sold orginated in Ohio, and bore the notation 'all payments made to our agents must be made by check or draft to our order'; that where Epstein did sell merchandise and collect, he would remit a check to the defendants' Ohio office; that although defendants' merchandise was sold in New York by Epstein and some others on a commission basis, defendants did not conduct a regular course of business in New York, had no office nor bank account here; that while it also appears that the name 'Hoge Brush Company' was listed in the door of Epstein's office, on the directory in his building and under his telephone number, this was unknown to and unauthorized by the defendants."

Question Involved

Did the courts of New York acquire jurisdiction of the persons of the defendants by the service of process under Section 229-b of the Civil Practice Act of the State of New York?

Argument

The petitioner erroneously contends that his application for a writ of certiorari should be favorably considered because of a conflict between the Circuit Court of Appeals of the Second District with that of the Ninth Circuit and a conflict between decisions of this Court and of the New York Court of Appeals. Petitioner is also in error in contending that questions of law are presented by the findings in the Court below. Thus he contends that a question is presented as to whether the respondents were engaged in business in the State of New York at the time jurisdiction of the courts of that State were invoked.

The record shows that the Courts below found as a fact that they were not so engaged in business.

The petitioner further argues that even if the defendants were not so engaged, the New York courts nevertheless had jurisdiction of the persons of the respondents because the controversy arises out of a business transaction initiated in New York. Here again the petitioner is in error because the pertinent statute upon which he relies does not attempt to invest the courts of New York with jurisdiction over non-residents not doing business in the State of New York merely because the transaction upon which the controversy is predicated was initiated there.

There is no question here involved as to the constitutionality of Section 229-b of the Civil Practice Act, nor whether it represents a valid exercise of police power as petitioner suggests in his petition, but rather of the application of said section to the facts herein involved.

It will be clear from an examination of said section that it applies only to a *case of non-resident natural persons who are actually doing business within the borders of New York State and have a recognized representative in charge of such business there.* It does not apply to non-resident natural persons who merely engage in isolated transactions and who have no representatives or agents in New York, nor does it apply to non-resident natural persons who are engaged in interstate commerce in New York but who have no agents or representatives present in that State.

POINT I

Section 229-b of the Civil Practice Act does not authorize constructive service of process upon absent non-resident natural persons unless they are represented in New York by an authorized representative who is actually doing business there on their behalf.

The petitioner correctly states that Section 229-b of the Civil Practice Act was enacted by the New York State Legislature in 1940 upon the recommendation of the Law Revision Commission of the State of New York.

On December 18, 1939, the Law Revision Commission of the State of New York recommended to the New York Legislature the adoption of an act to amend the Civil Practice Act in relation to the service of summons on non-resident natural persons doing business in the State of New York together with a study in connection therewith (see report of the Law Revision Commission for the year 1940 at pages 105-155).

The Commission pointed out the reasons for the suggested change as follows:

> "There is no constitutional difficulty in obtaining personal jurisdiction over a nonresident defendant

engaged in business in this state where such defendant is a foreign corporation and as such subject to regulations imposed by the state in which it seeks to do business (see *Paul* v. *Virginia*, 8 Wall. 168 [1868]); in such case service of summons may be made on the secretary of state as agent of the corporation in accordance with the provisions of the General Corporation Law (sections 210, 217). But, where the nonresident defendant is a natural person doing business in this state, it is at present impossible to obtain jurisdiction over his person in New York in a proceeding at law or in equity if he remains outside the state and conducts his business through local agents. The question of jurisdiction in such a situation was brought to the attention of the Commission in connection with the operation of the New York Fair Trade Act but is not by any means confined to such a case.

Since the decision of the Supreme Court of the United States in *Pennoyer* v. *Neff* (95 U. S. 714 [1877]) it has been recognized as a general rule of constitutional law that personal service of process on the defendant within the jurisdiction of the court from which the summons issues is a necessary prerequisite of personal jurisdiction, as distinguished from jurisdiction 'in rem' directed only against property within the state, and that a judgment purporting to determine the defendant's personal rights and obligations and obtained without such personal service within the jurisdiction is void for want of due process of law. These rules are reflected in the provisions of the New York Civil Practice Act relating to service of summons (see sections 218, 225) and providing for personal service except in cases 'in rem', where proceedings may be initiated through service by publication or service outside of the state (sections 232, 233). Since the courts have also held that the mere transaction of business in a state by nonresident natural persons does not imply consent to jurisdiction (*Pope* v. *Heckscher*, 266 N. Y. 114 [1934]), such persons are now generally immune from suit in New York except in the limited number of cases where a warrant of attachment against their property located in this state may be granted (section 902 of the Civil Practice Act). However, in two specific instances a statutory method has been provided in New York, which permits the exercise of per-

sonal jurisdiction over non-resident individuals who have committed acts within the state, either in person or through an agent: Section 52 of the Vehicle and Traffic Law permits service of process on the Secretary of State in all actions against nonresident motorists and section 442-g of the Real Property Law makes similar provisions for actions against nonresident real estate brokers. In both types of cases the legislation has been held constitutional. (See the decisions of the Supreme Court of the United States discussed below.)

The Commission believes unsatisfactory the present state of the law, which places a nonresident natural person, who does business in New York through an agent, beyond the jurisdiction of New York courts. A nonresident engaged in any lawful business in New York, though he could not have been excluded, enjoys the protection of the laws of the state and should be amenable to the process of its courts in all actions growing out of such business. It is manifestly unfair to require the creditor of such person to litigate local transactions in the courts of a foreign state, while the creditor of a resident individual or of a foreign corporation doing business in New York may resort to the local courts.

The Supreme Court of the United States has recognized that in cases involving nonresident motorists a statute like section 52 of the Vehicle and Traffic Law, providing for service on the Secretary of State as the defendant's agent and forwarding of notice to the defendant outside the state, is a valid exercise of the police power and not in conflict with any provision of the federal Constitution (*Hess* v. *Pawlowski*, 274 U. S. 352 [1927]). The Supreme Court has also, in a case involving a nonresident dealer in securities, upheld an Iowa statute providing for service of process on the resident agent in charge of the defendant's local business (*Doherty* v. *Goodman*, 294 U. S. 623 [1935]). In forty-three states there are statutes applicable to various specified businesses, such as dealing in securities, real estate, insurance, dairy supplies and agricultural supplies, which provide for personal actions against nonresidents doing business in the state. In them provision is usually made for service of process on some state official as agent of the nonresident defendant."

The act proposed read as follows:

"§ 229-b. Service of summons on nonresident natural person doing business in this state. *When any natural person or persons not residing in this state shall engage in business in this state,* in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof *with the complaint with an agent in charge of such business within this state,* and any summons so served shall be of the same legal force and validity as if served personally on such nonresident person or persons so engaging in business in this state within the territorial jurisdiction of the court from which the summons issues, provided that a copy of such summons and complaint together with a notice of such service upon such agent according to the provisions of this section shall be forthwith sent to such nonresident person or persons by registered mail, return receipt requested.

The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, his affidavit of compliance herewith, a copy of the summons and complaint, and either a return receipt purporting to be signed by the defendant or defendants, or a person qualified to receive his or their registered mail, in accordance with the rules and customs of the post-office department; or, if acceptance was refused by the defendant or defendants, or his or their agent, the original envelope bearing a notation by the postal authorities that receipt was refused, and the plaintiff's affidavit that he forthwith sent notice of such mailing and refusal to the defendant or defendants by ordinary mail. Where the summons is mailed to a foreign country, other official proof of the delivery of the mail may be filed in case the post-office department is unable to obtain such a return receipt. The foregoing papers shall be filed within thirty days after the return receipt or other official proof of delivery or the original envelope bearing a notation of refusal, as the case may be, is received by the plaintiff. Service of process shall be complete ten days after such papers are filed. The return receipt or other official proof of delivery shall constitute presumptive evidence that

the summons mailed was received by the defendant or defendants or a person qualified to receive his or their registered mail; and the notation of refusal shall constitute presumptive evidence that the refusal was by the defendant or defendants or his or their agent.

Service of such summons may also be made by leaving a copy thereof with the complaint with the agent in charge of the business of such nonresident defendant or defendants within this state and by delivering a duplicate copy thereof, with the complaint annexed thereto, to the defendant or defendants personally without the state by a resident or citizen of the state of New York or by a sheriff, under-sheriff, deputy-sheriff or constable of the county or other political subdivision in which the personal service is made, or by an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, or by an attorney and/or counsellor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshal or deputy United States marshal. Proof of personal service without the state shall be filed with the clerk of the court in which the action is pending within thirty days after such service. Personal service without the state is complete ten days after proof thereof is filed.

The court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action." (Italics ours.)

It is thus apparent that the act was not designed to reach every non-resident person who may have made a contract in New York State but only such *as actually are presently engaged in business in this State and who have an agent in charge of such business therein.* Indeed, in the following year the Law Revision Commission recommended an amendment clarifying Section 229-b (see report for 1941, pp. 415-421). In this recommendation is made the following statement:

"It has been suggested that the statute does not make clear whether the person to be served is the person in charge of the defendant's business at the time of such

service, or the person who was in charge when the transaction out of which the cause of action arose, occurred.

The distinction is important, both where a new agent has taken charge of the business since the transaction out of which the action arises, and, more particularly in cases *where the defendant has ceased to do business in the state at the time when it is sought to commence the action against him.* In either case a construction of the statute permitting service on a nonresident by leaving a copy of the summons with a person who happened to be in charge of the business at some time previous to such service would raise questions as to the validity of the statute." (Italics ours.)

As a result of this recommendation the statute was amended to read as quoted by petitioner at pages 3 and 4 of his petition.

Inasmuch as it has been found below that the respondents never did business in New York State nor had any authorized agent present at the time service of the summons was effected on Epstein, the courts of New York acquired no jurisdiction. Indeed, the New York Court of Appeals in the recent case of *Yeckes-Eichenbaum* v. *McCarthy*, 290 N. Y. 437, decided on March 27, 1943, has so ruled. That Court at pages 443-444 said:

"The debtor corporation maintained a fiscal office at 37 Wall Street in the city of New York for the purpose of maintaining its corporate existence, the presence of its records and the registration and transfer of its stocks and bonds. Transaction of such business was not within the province of the trustees but they bore the expense of continuing the maintenance of the office as an expense of administration. Hatton was the assistant secretary of the debtor in charge of that office but he was not employed by the trustees. He swore in his affidavit that the defendants were not engaged in business in this State and that he was not engaged in or in charge of any business of the defendants in the State. The positive testimony of Hatton, who was in a position to know, must be accepted as conclusive testimony that he was in charge of no busi-

ness for the defendants as against mere surmise sought from circumstances alone. Taylor v. Granite State Provident Ass'n, 136 N. Y. 343, 32 N. E. 992, 32 Am. St. Rep. 749. The office at 500 Fifth Avenue was maintained by the debtor and the defendants who engaged Kenny and others solely in the solicitation of freight and passenger business for competitive points outside New York State. That office handled no cash, sold no tickets and issued no bills of lading. Neither did the defendants handle any cash in New York State in connection with transportation business. Assuming, that the defendants as trustees stood in the same position as the railroad company, the facts shown here are insufficient to show that the defendants were doing business within the State of New York (Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916) or that Kenny was in charge of any business for them on the basis of which service of the summons on Kenny was sufficient to satisfy the requirements of section 229-b of the Civil Practice Act. The plaintiff was required to show not only that the defendants were doing *a substantial part* of their business in New York (Holzer v. Dodge Brothers, 233 N. Y. 216, 221, 135 N. E. 268), but that the agent in charge was invested with general powers involving judgment and discretion. Taylor v. Granite State Provident Ass'n, supra."

See also *Chaplin* v. *Selznick*, 293 N. Y. 529; *Jacobowitz* v. *Thompson*, 141 Fed. 2nd 72; *Barnett* v. *Texas & P. Ry. Co.*, 145 Fed. 2nd 800.

Since petitioner does not bring himself within the confines of Section 229-b of the Civil Practice Act, the Court had no jurisdiction.

It follows that it is not a question here, as the counsel for the petitioner indicated, as to whether the Legislature of New York could not validly invest its Courts with jurisdiction over the person of a non-resident natural person if the question involved a breach of contract in New York or tortious conduct therein, but a question whether the New York Legislature had done so here. It is plain from an examination of the statute and its legislative history that the question is not justiciable here.

POINT II

The decisions below are not in conflict either with those of another Circuit Court, or with the applicable decisions of this Court or with those of the State of New York.

The case of *Alaska Commercial Co.* v. *Debney*, 144 Fed. 1, said to be in conflict with the decision below, is not at all in point. That case involved the validity of a judgment of the territorial court of Yukon Territory, Canada. The Canadian statute under which the judgment was obtained provided that the writ of summons might be made upon any defendant who was out of the territory if he had appointed an agent, managing clerk or other representative, resident and carrying out his business in the territory. The defendant there had left the territory but had appointed his brother an agent to represent him in that territory and to carry on all business relating to his business therein. Service of the summons was held good. Here Epstein had not been appointed agent and was not carrying on defendants' business at the time the action was commenced. Indeed, it was questionable whether he had done any business of the defendants, except that of occasionally soliciting orders for the respondents as well as others engaged in similar business.

Nor is the decision below in conflict with *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *Henry L. Doherty & Co.* v. *Goodman*, 294 U. S. 623, and *Hess* v. *Pawloski*, 274 U. S. 352.

The *International Harvester* case is distinguishable for the reason stated in *Davega* v. *Lincoln Furniture Mfg. Co.*, 29 Fed. 2nd 164. Moreover, even if the defendants can be said to have done business in New York, they had no agent in this State in charge of their business at the time of the attempted service of process.

The *Doherty* case involved the constitutionality of a statute of Iowa, substantially similar to the one involved

in the case at bar. The defendant established an office in Des Moines, Iowa, and through agents there carried on the business of selling securities throughout the State. A district manager was designated who took charge of the office and he was served with process in accordance with the statute. The service was held good.

The *Hess* case involved the constitutionality of a statute of Massachusetts which provided in substance that a nonresident owner of a motor vehicle was subject to the personal jurisdiction of the courts of Massachusetts in an action growing out of an accident or collision in the State and service upon him might be made constructively. Such a statute was held not to violate the Constitution, the Court holding that:

> "* * * the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served. * * * The difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment."

There is, therefore, no special or important reason for review on writ of certiorari in this case.

CONCLUSION

The application should be denied.

Respectfully submitted,

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